No. 34154

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

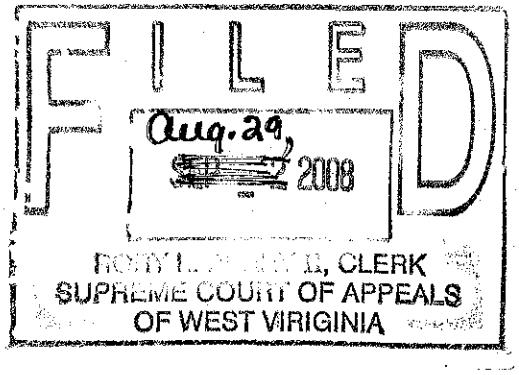
Christal M. Dempsey, a.k.a.
Christal M. Smith,

Plaintiff - Appellant,

v.

Builders' Service and Supply Company, Clark Sinclair, Sheriff of Taylor County, West Virginia, and Edward Charlton, d/b/a Charlton Construction,

Defendants - Appellees.



BRIEF OF APPELLEE

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I. INTRODUCTION

Appellee Builders' Service and Supply Company ("Builders' Service") submits this Brief of Appellee. This Court should affirm the Order of the Circuit Court of Taylor County, which denied the Motion to Reconsider Order Denying Motion to Reinstate pursuant to West Virginia Rule of Civil Procedure 60(b) filed by Appellant Christal M. Dempsey a/k/a Christal M. Smith. A motion for relief from judgment made pursuant to Rule 60(b) is addressed to the sound discretion of the circuit court. The circuit court properly dismissed the counterclaim filed by Appellant against Builders' Service pursuant to West Virginia Rule of Civil Procedure 41(b) for inactivity for more than one year. Appellant failed to show good cause, which would entitle her to reinstatement of her counterclaim.

The circuit court properly weeded out Appellant's counterclaim, which arises in connection with the events surrounding the sale and purchase of building materials and supplies from Builders' Service for use in improvements to certain real estate owned by Appellant located at Route 1, Box 334, Thornton, Fetterman District, Taylor County, West Virginia (the "Subject Property"). The circuit court correctly exercised it discretion pursuant to West Virginia Rule of Civil Procedure 41(b), dismissing Appellants' claims, with prejudice, for failing to engage in any proceeding relating to the case for more than one year. Furthermore, the circuit court correctly denied Appellant's Motion to Reinstate her Counterclaim and her Motion to Reconsider Order Denying Motion to Reinstate because she failed to show good cause justifying her delay in pursuing her claims.

For all of these reasons, this Court should affirm the Order of the Circuit Court of Taylor County, denying Appellant's Motion to Reconsider Order Denying Motion to Reinstate.

II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Builders' Service initiated this action by filing a complaint against Appellant in the Circuit Court of Taylor County on August 5, 2003. The complaint was filed pursuant to West Virginia Code Section 38-2-34 to enforce a perfected mechanic's lien recorded in the Office of the Clerk of the County Commission of Taylor County, West Virginia on or about March 11, 2003 by Builders' Service against the Subject Property. The complaint contains a claim that Appellant acquired building materials and supplies from Builders' Service to make improvements to the Subject Property and failed to pay the total purchase price. The complaint demands compensatory damages.

On September 16, 2003, Appellant filed her answer, counterclaim and third-party complaint against Edward Charlton d/b/a Charlton Construction ("Charlton Construction") in the Circuit Court of Taylor County. For approximately one year, the parties engaged in discovery and filed amended pleadings. Then, on October 6, 2004, counsel for Appellant, Charles E. Anderson, filed a Motion to Withdraw as Counsel. On November 4, 2004, a hearing was held concerning this motion. The motion was denied as reflected by an Order entered November 15, 2004. This Order was the final activity in the case undertaken by any party until January 17, 2006, when the Circuit Clerk of Taylor County, Vonda M. Reneman, issued a Notice of Intended Dismissal of Action Under Rule 41(b). The circuit clerk's notice served to inform both Builders' Service and Appellant that their respective claims would be dismissed unless they could show good cause for their delay in prosecution. On February 17, 2006, neither party having filed a motion to maintain the case on the docket and showing good cause to do so, the circuit court entered an order dismissing the claims of both Builders' Service and Appellant for failure to engage in any proceeding for more than one year.

The docket remained idle in this matter for another full year until February 16, 2007, when William C. Brewer entered a notice of appearance as counsel for Appellant and filed a Motion to Reinstate. By Order entered March 21, 2007, the circuit court denied Appellant's motion, finding that Appellant failed to show good cause to excuse her neglect in prosecution of the case. In fact, the circuit court noted that Appellant filed an unrelated action on February 23, 2005 in Case Number 05-C-17. The circuit court dismissed that case by Order entered December 7, 2006 as a result of inactivity for a period more than one year under Rule 41(b) of the West Virginia Rules of Civil Procedure.

On June 13, 2007 Appellant filed a Motion to Reconsider Order Denying Motion to Reinstate. In an Order dated July 11, 2007, the Court found that all matters had been taken into consideration in previous Orders entered in the case and denied the motion.

On November 9, 2007, Appellant filed a petition for appeal in the circuit court. Following oral presentation on June 10, 2008, this Court granted the petition for appeal by a vote of 3-2. Chief Justice Maynard and Justice Davis would refuse.

III. STATEMENT OF FACTS

Builders' Service is a West Virginia corporation with its principal place of business near Grafton, West Virginia. Builders' Service sells building supplies and materials. (Plaintiffs' Complaint at ¶ 1.) Appellant owns the Subject Property. (Id. at ¶ 2.) On or about May 15, 2002, Appellant entered into a contract with Edward Charlton d/b/a Charlton Construction in which Charlton Construction agreed to perform for Appellant certain labor and furnish materials for the remodeling and construction of her home located on the Subject Property. (Defendant's Third-Party Complaint at ¶ 3.) Building materials and supplies from Builders' Service totaling $3,409.81 to make improvements to the Subject Property were purchased by Mr. Charlton. (Compl. ¶ 3.) However, Builders' Service was not paid for the materials. (Id.) On March 11,

2003, Builders' Service filed a mechanic's lien pursuant to West Virginia Code Section 38-2-4[1] against the Subject Property with the Office of the Clerk of the County Commission of Taylor County, West Virginia. (Id. at ¶ 4; Ex. 1 and 2.) Then, on August 5, 2003, Builders' Service initiated this action by filing a complaint to enforce the perfected lien. (See id.)

On September 16, 2003, Appellant filed her answer, counterclaim and third-party complaint against Edward Charlton d/b/a Charlton Construction in the Circuit Court of Taylor County. Appellant's counterclaim alleges that Builders' Service allowed Charlton Construction to charge materials without her authorization or consent. (Appellant's Counterclaim at ¶ 1.) Appellant's Counterclaim further alleges that Builders' Service fraudulently induced her to pay $5,992.14 as payment in full of the balance of the unauthorized account. (Id. at ¶ 4.) Appellant's Third-Party Complaint alleges that Charlton Construction failed to perform the contract to its completion. (Appellant's Third-Party Compl. at ¶ 4.) Appellant alleges that Charlton Construction committed fraud upon her by receiving monies from her to pay for construction supplies that were converted to its own use, charging materials in her name without her authorization, charging materials in her name that were not used in the construction on her property and charging materials in her name that were personal items any "reputable contractor would have for his construction business." (Id. at ¶ 5).

[1] West Virginia Code Section 38-2-4 provides that

> Every person, firm or corporation, which shall furnish to any general contractor or to any subcontractor mentioned in sections one and two of this article, any materials, machinery or other equipment or supplies necessary to the completion of any building or other structure mentioned in this article, or improvement appurtenant thereto, for use in the erection, construction, repair or removal thereof, by virtue of a contract between such general contractor or subcontractor and the materialman or furnisher of machinery, or other supplies or equipment necessary to the completion of such general contract, shall have such a lien for his compensation as is mentioned in section one of this article.

IV. STATEMENT OF THE ISSUE

Whether the Circuit Court of Taylor County properly denied Appellant's Motion to Reconsider Order Denying Motion to Reinstate finding that all matters had previously been taken into consideration and that Appellant had failed to show good cause warranting reinstatement of her Counterclaim dismissed pursuant to West Virginia Rule of Civil Procedure 41(b).

V. STANDARD OF DECISION AND REVIEW

The West Virginia Supreme Court of Appeals general standard of review under both Rule 60(b) and Rule 41(b) is whether the ruling of the circuit court constituted an abuse of discretion. With regard to Rule 60(b), in syllabus point 5 of Toler v. Shelton, the West Virginia Supreme Court of Appeals held: "A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court, and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." 157 W.Va. 778, 204 S.E.2d 85 (1974); see also Tolliver v. Maxey, 218 W.Va. 419, 423, 624 S.E.2d 856, 860 (citing Syl. pt. 6, Law v. Monongahela Power Company, 210 W.Va. 549, 558 S.E.2d 349 (2001); syl. pt. 4, Rose v. Thomas Mem'l Hospital Found., Inc., 208 W.Va. 406, 541 S.E.2d 1 (2000); syl. pt. 1, Blair v. Ford Motor Credit Company, 193 W.Va. 250, 455 S.E.2d 809 (1995); see also, Lugar & Silverstein, West Virginia Rules of Civil Procedure, p. 466 (Michie 1960) (Granting of motions under Rule 60(b) "rests within the sound discretion of the trial court and may be upon such terms as the court finds just.")). This standard of review reflects the trial court's institutional position as the forum best equipped for determining the appropriate use of Rule 60(b). See Jordache Enters., Inc. v. National Union Fire Ins. Co., 204 W. Va. 465, 513 S.E.2d 692 (1998). Hence, this Court is loath to substitute its judgment for that of the trial judge. Toler v. Shelton, 157 W.Va. 778, 204 S.E.2d 85.

Similarly, with regard to Rule 41(b), and its related statutory provision, W. Va. Code Section 56-8-12 (1923), the syllabus point in Murray v. Roberts, 117 W.Va. 44, 183 S.E. 688 (1936), holds:

> A motion to reinstate a dismissed action under the terms of Code, 56-8-12 [W. Va. R.C.P. 41(b)], is addressed to the sound discretion of the trial court, and, in the absence of a showing of abuse of that discretion, the action of the trial court upon such motion will not be disturbed upon writ of error. Higgs v. Cunningham, 71 W.Va. 674, 77 S.E. 273 [1913].

Tolliver v. Maxey, 218 W.Va. 419, 423, 624 S.E.2d 856, 860 (2005) (quoting syl. pt. 1, Covington v. Smith, 213 W.Va. 309, 582 S.E.2d 756 (2003); see also, syl. pt. 4, White Sulphur Springs, Inc. v. Jarrett, 124 W.Va. 486, 20 S.E.2d 794 (1942) (Holding that a trial court, "upon a motion to reinstate a suit or action, under Code, 56-8-12, is vested with a sound discretion with respect thereto; but that discretion can only operate on evidence tending to establish facts upon which a finding can be based."); syl. pt. 1, Belington Bank v. Masketeers Company, 185 W.Va. 564, 408 S.E.2d 316 (1991); syl., Snyder v. Hicks, 170 W.Va. 281, 294 S.E.2d 83 (1982); 6A M.J., Dismissal, Discontinuance and Nonsuit § 18 (2001)).

VI. DISCUSSION

A. Appellant's Appeal is Limited to the Order Denying Her Motion to Reconsider Order Denying Motion to Reinstate.

A motion made pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure does not toll the running of the appeal time. Toler v. Shelton, 157 W.Va. 778, 204 S.E.2d 85 (1974). Rule 60(b) provides a remedy which exists concurrently with and independently of the remedy of appeal. Parkway Fuel Serv. v. Pauley, 159 W. Va. 216, 220 S.E.2d 439 (1975). Accordingly, an appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order. Id. at Syl. Pt. 3. It is not the purpose and function of this Court in a review

of a denial of a 60(b) motion to rule upon the substance of the appellant's assertion. Id. 157 W.Va. at 786, 204 S.E.2d at 90.

In the present case, Appellant's only appeal that remains is from the Order denying her Motion to Reconsider Order Denying Motion to Reinstate entered on July 11, 2007. In turn, this Court's review is limited to the order of denial of Appellant's Motion to Reconsider Order Denying Motion to Reinstate. The substance supporting the circuit court's Order denying Appellant's Motion to Reinstate entered March 21, 2007 is not at issue in this Appeal. Any appeal from that Order was abandoned when Appellant failed to file a timely petition for appeal from the Order on or before July 21, 2007. Accordingly, the narrow scope of this appeal is to determine whether the circuit court abused its discretion when it denied Appellant's Motion to Reconsider Order Denying Motion to Reinstate filed pursuant to Rule 60(b). No other consideration or review may be afforded Appellant.

B. The Circuit Court Properly Denied Appellant's Motion to Reconsider Order Denying Motion to Reinstate.

Rule 60(b) of the West Virginia Rules of Civil Procedure provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

W. Va. R. Civ. P. 60(b). The purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment. See Gerver v. Benavides, 207 W. Va. 228, 530 S.E.2d 701 (1999). It is well established that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available, but not offered at the original proceeding. See Jividen v. Jividen, 212 W. Va. 478, 575 S.E.2d 88 (2002). The rule is designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law. Citing Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure (hereinafter "Litigation Handbook"), § 60(b), p. 1189 (3d ed. 2008). Where the motion is nothing more than a request that the court change its mind, it is not authorized by Rule 60(b). Id. A trial court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it. Id. In other words, a Rule 60(b) motion is simply not an opportunity to reargue facts and theories upon which a court has already ruled. Kerner v. Affordable Living, Inc., 212 W Va. 312, 570 S.E.2d 571 (2002); Powderidge Unit Owners Ass'n v. Highland Props., 196 W. Va. 692, 474 S.E.2d 872 (1996). Stated another way, the basis for setting aside a judgment under the rule must be something that could not have been used to obtain a reversal by means of a direct appeal. Litigation Handbook, § 60(b), p. 1189 (citing Bell v. Eastman Kodak Co., 214 F.3d 798 (7th Cir. 2000)).

Appellant has failed to clearly articulate which Rule 60(b) exception entitles her to relief from the circuit court's Order on her Motion to Reinstate. In her Motion to Reconsider Order Denying Motion to Reinstate, Appellant only states that she filed the motion pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. Then, buried on page 17 of her brief, Appellant states:

Rule 60(b) of the West Virginia Rules of Civil Procedure provides, in pertinent part, as follows:

> Rule 60. Relief from judgment order ...
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; . . . . or (6) any other reason justifying relief from the operation of the judgment.

This suggests Appellant seeks relief from the circuit court's decision pursuant to exception one or six of Rule 60(b). However, Appellant provides no explanation or argument explaining why she is under this belief. Simply put, Appellant could not meet the requirements set forth in exception one or six and, therefore, was not entitled to relief under Rule 60(b).

Neither of the grounds set forth in Appellant's brief exist in this matter, nor has any of them ever been alleged to have occurred. Instead, the Appellant would like an opportunity to re-argue the substance of the law and evidence that existed at the time of the circuit court's initial decision denying reinstatement of her counterclaim and third-party complaint. Appellant has advanced a somewhat conflicting argument on appeal. First, she argues that she adequately demonstrated good cause to the circuit court for the reinstatement of her case. (Appellant's Brief at 7-11.) Second, she argues she should have had an opportunity to go before the circuit court to present evidence of good cause for reinstatement of her case. (Appellant's Brief at 12.) Neither argument is supported by the purpose of a Rule 60(b) motion. A Rule 60(b) motion is not an opportunity to reargue facts and theories upon which a court has already ruled. Powderidge Unit Owners Ass'n v. Highland Props., 196 W. Va. 692, 474 S.E.2d 872 (1996). The rule is designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law. Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Litigation

Handbook on West Virginia Rules of Civil Procedure, § 60(b), p. 1189 (3d ed. 2008). If Appellant wished to advance these arguments to this Court, she should have appealed from the circuit court's Order denying her Motion to Reinstate. The basis for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal. Id. Accordingly, the circuit court correctly denied Appellant's Motion to Reconsider Order Denying Motion to Reinstate.

C. Even if this Court Finds that the Circuit Court Should Have Granted Appellant's Motion to Reconsider Order Denying Motion to Reinstate, Appellant is Not Entitled to Reinstatement of Her Case.

Rule 41(b) of the West Virginia Rules of Civil Procedure provides that a case may be dismissed involuntarily for a plaintiff's failure to prosecute his claims or comply with discovery:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.
>
> Any court in which is pending an action wherein for more than one year there has been no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued. . . .

W. Va. R. Civ. P. 41(b).

This Court has made it clear that a circuit court has discretion to order dismissal where the plaintiff has failed to reasonably move the case forward. See Dimon v. Mansy, 198 W. Va. 40, 45-46, 479 S.E.2d 339, 344-45 (1996). The Court explained the important role of Rule 41(b) dismissals:

> The judicial authority to dismiss with prejudice a civil action for failure to prosecute cannot be seriously doubted. This power to

> invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases, and to avoid congestion in the calendar of the circuit court. 9 Wright & Miller, Federal Practice and Procedure § 2369 at 331 (1994); 3 Blackstone Commentaries 295-96 (1768). In the course of discharging their traditional responsibilities, circuit courts are vested with inherent and rule authority to protect their proceedings from the corrosion that emanates from procrastination, delay and inactivity. Thus, the determination whether the plaintiff has failed to move the case in a reasonable manner is a discretionary call for the circuit court. The power to resort to the dismissal of an action is in the interest of orderly administration of justice because the general control of the judicial business is essential to the trial court if it is to function.

Id., 198 W. Va. at 45, 479 S.E.2d at 344. Where a circuit court determines that a case should be dismissed because of the plaintiff's undue delay, it must give the parties pre-dismissal notice and an opportunity to be heard. See id., 198 W. Va. at 46, 479 S.E.2d at 345. Thereafter, the court can dismiss the action with prejudice unless the plaintiff can prove good cause for the delay. See id.

1. Appellant has failed to show good cause to justify her failure to prosecute her claim.

In Dimon, the West Virginia Supreme Court of Appeals "squarely h[e]ld that a plaintiff has a continuing duty to monitor a case from the filing until the final judgment, and where he or she fails to do so, the plaintiff acts at his or her own peril." 198 W.Va. at 45, 479 S.E.2d at 344. More specifically, "it is the plaintiff's obligation to move his or her case to trial, and where the plaintiff fails to do so in a reasonable manner, the case may be dismissed as a sanction for the unjustified delay." Id. In weighing the evidence of good cause and substantial prejudice to overcome dismissal of a matter pursuant to Rule 41(b), a court should consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice.

In Dimon, the plaintiff contended that good cause was shown to have his case reinstated. 198 W.Va. at 47-8, 479 S.E.2d at 346-47. The plaintiff argued to the circuit court, and to this Court, that his previous counsel was withdrawing from the practice of law beginning in 1993, and that he was unable to find substitute counsel due to financial constraints. Id. In support of this alleged good cause, the plaintiff cited this Court's decision in Evans v. Gogo, 185 W.Va. 357, 407 S.E.2d 361 (1990), wherein the Court held that substitution of out-of-state counsel under the facts of that case demonstrated good cause for reinstatement. Id. The Court held:

> Evans does not come to the aid of the plaintiff. The defendants herein correctly argue that Evans is clearly distinguishable from the instant matter in three respects. First, the withdrawing counsel in Evans was an out-of-state attorney, but counsel in the instant case was an in-state attorney. Second, the plaintiff's counsel in Evans was able to produce documents showing that some activity had, in fact, taken place in the case during its apparent dormancy. However, in the instant matter, the only activity the plaintiff has offered is an alleged litigation visit to a doctor on the day the circuit court struck the case from its docket. Finally, in Evans, the out-of-state counsel withdrew from the case before the case was stricken from the circuit court's docket.

Id. Further, the Court held that plaintiff's counsel withdrew after the case was removed from the circuit court's docket. Id. Although the plaintiff contended that he could not procure substitute counsel from 1993 up to the date of dismissal of his lawsuit, the plaintiff readily found substitute counsel immediately after the case was stricken from the docket. Id. Given these circumstances, the Court held that the plaintiff's proffer of good cause establishes a standard that would do away with this requirement. Id. The Court was not prepared to adopt plaintiff's nonstandard, holding that "[t]he law aids those who are diligent, not those who sleep upon their rights." Id. (quoting Taylor v. Smith, 171 W.Va. 665, 667, 301 S.E.2d 621, 624 (1983)). There, the Court concluded that the plaintiff had not established good cause. Id.

Here, like in Dimon, Appellant cannot establish good cause to excuse her failure to prosecute her claim. Appellant's proffered evidence to establish good cause is insufficient. Prior to the entry of the Dismissal Order, the last activity in this matter was Charles E. Anderson's Motion to Withdraw as Counsel, filed on October 6, 2004. A hearing on the motion was held on November 4, 2008 and an Order entered on November 15, 2004. In his motion, Mr. Anderson asked for leave to withdraw as counsel for Appellant on the grounds that there was a strong possibility that one of the witnesses for Builders' Service is a former client of Mr. Anderson. Under these circumstances, Mr. Anderson expressed doubt that he could represent Appellant without being prejudiced by the prior representation. Mr. Anderson's motion was denied. However, the circuit court, in its November 15, 2004 Order, instructed Appellant that if she desired to have new counsel, she should hire new counsel and that counsel should file a notice of appearance.

Following the Court's November 15, 2004 Order, there was no further activity in the case until January 17, 2006, when the Circuit Clerk of Taylor County, Vonda M. Reneman, issued a "Notice of Intended Dismissal of Action Under Rule 41(b)." Appellant proffers no evidence to demonstrate what activities, if any, she engaged in to monitor her case and to move it to trial. Rather, Appellant's only evidence to support her motion to reinstate her counterclaim was that she "had difficulties with her counsel of record" and that "the attorney/client relationship terminated between this party and her counsel and ongoing activity in the matter ceased." Similarly, Appellant now argues to this Court that her Counterclaim should be reinstated because she had difficulties with her counsel of record, Mr. Anderson. Appellant claims that following the November 15, 2004 order denying Mr. Anderson's motion to withdraw she "informed Mr. Anderson that she still wanted him to continue to represent her interest in this matter and as a

result there was no need for [Appellant] to seek or employ new counsel." (Appellant's Brief at 9.) Furthermore, Appellant claims "[she] was under the belief that Mr. Anderson was continuing to represent her throughout the period of inactivity." (Appellant's Brief at 9-10.) Appellant claims that "the attorney-client relationship between [her] and Mr. Anderson deteriorated and eventually ceased, though [she] did not consent to the termination of the relationship. [Appellant] was never informed by her counsel that the trial court had sent out a Notice of Intended Dismissal of Action under Rule 41(b) . . . ."

Interestingly, Appellant only speaks in generalities as to the deterioration of her relationship with Mr. Anderson. Appellant has failed at every juncture to provide evidence of how she fulfilled her duty to monitor her case and to move it towards trial. Appellant states as evidence of good cause that she "was under the belief" that Mr. Anderson was prosecuting her claim. However, Appellant fails to identify any evidence that would allow either this Court, or for that matter, the circuit court, to evaluate whether her "belief" was warranted. The record below is void of any evidence that Appellant ever made any inquiries to Mr. Anderson about the status of the case during the more than one year dormancy of this matter. Only on appeal does Appellant finally boldly state that she "had contacted Mr. Anderson several times during the approximately 1 year and 3 months of dormancy to ensure that Mr. Anderson was still representing her in regard to this case." (Appellant's Brief at 15.) Nevertheless, she failed to identify how, why or even when the attorney-client relationship with Mr. Anderson deteriorated or ceased to exist. Appellant's silence suggests that she does not know because she failed to monitor her case and move it towards trial.

Appellant, for the first time on appeal, raises the issue that she was involved in a car accident on October 29, 2004, and that during the period of inactivity in this case she sought

treatment for her injuries. First, Appellant never cited this accident as good cause for her delay in prosecuting her claim in her "Motion to Reinstate" or her "Motion to Reconsider Order Denying Motion to Reinstate" filed with the circuit court. The West Virginia Supreme Court of Appeals has held that issues not raised in the trial court and first raised on appeal are considered waived. Roberts v. Stevens Clinic Hosp., 176 W. Va. 492, 345 S.E.2d 791, 798-99 (1986); Bell v. West, 168 W. Va. 391, 284 S.E.2d 885, 888 (1981). Second, as Appellant's Motion to Reconsider Order Denying Motion to Reinstate aptly points out, Appellant filed at least three other civil actions during the period of inactivity in this case and in which she sought treatment for her injuries. Appellant filed two additional claims in Taylor County, West Virginia bearing Civil Action Numbers 05-C-17 and 05-C-80. Civil Action No. 05-C-17 was dismissed by the circuit court due to inactivity. Additionally, Appellant pursued another claim in Marion County, West Virginia bearing the Civil Action Number: 05-C-272.[2] It could hardly be said that the car accident in which the Appellant was involved rendered her unable to engage in litigation. Third, according to Appellant's brief she inquired "several times during the approximately 1 year and 3 months of dormancy to ensure that Mr. Anderson was still representing her in regard to this case." Under these circumstances, it is unclear what impact Appellant is claiming her car accident had on her ability to prosecute her claims.

Appellant has failed in every respect to show good cause for her delay in prosecuting her claims. Appellant is no stranger to the litigation process nor is she a stranger to abandoning claims. Two of the three causes of action Appellant filed in the Circuit Court of Taylor County, West Virginia were dismissed for failure to prosecute. Appellant had a duty to monitor her case and move it to trial, which she failed to fulfill.

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[2] Appellant filed a fourth claim in Monongalia County, West Virginia bearing the Civil Action Number 06-C-657.

2. Pursuant to Rule 41(b), the circuit court provided Appellant notice and a right to be heard.

Pursuant to West Virginia Rule of Civil Procedure 41(b) and the guidelines set forth in Dimon, the circuit court provided Appellant notice and a right to be heard when so required. In Syllabus Point 3 of Dimon, this Court set forth the guidelines that should be followed when carrying out the notice and opportunity to be heard requirements under West Virginia Rule of Civil Procedure 41(b):

> **First**, when a circuit court is contemplating dismissing an action under Rule 41(b), the court must first send a notice of its intent to do so to all counsel of record and to any parties who have appeared and do not have counsel of record. The notice shall inform that unless the plaintiff shall file and duly serve a motion within fifteen days of the date of the notice, alleging good cause why the action should not be dismissed, then such action will be dismissed, and that such action also will be dismissed unless plaintiff shall request such motion be heard or request a determination without a hearing.
>
> **Second**, any party opposing such motion shall serve upon the court and the opposing counsel a response to such motion within fifteen days of the service of such motion, or appear and resist such motion if it be sooner set for hearing.
>
> **Third**, if no motion is made opposing dismissal, or if a motion is made and is not set for hearing by either party, the court may decide the issue upon the existing record after expiration of the time for serving a motion and any reply. If the motion is made, the court shall decide the motion promptly after the hearing.
>
> **Fourth**, the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant.
>
> **Fifth**, the court, in weighing the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case

during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice.

Sixth, if a motion opposing dismissal has been served, the court shall make written findings, and issue a written order which, if adverse to the plaintiff, shall be appealable to this Court as a final order; if the order is adverse to the defendant, an appeal on the matter may only be taken in conjunction with the final judgment order terminating the case from the docket. If no motion opposing dismissal has been served, the order need only state the ground for dismissal under Rule 41(b).

Seventh, if the plaintiff does not prosecute an appeal of an adverse decision to this Court within the period of time provided by our rules and statutes, the plaintiff may proceed under Rule 41(b)'s three-term rule to seek reinstatement of the case by the circuit court-with the time running from the date the circuit court issued its adverse order.

Eighth, should a plaintiff seek reinstatement under Rule 41(b), the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff had responded to the court's initial notice, and a ruling on reinstatement shall be appealable as previously provided by our rule.

Id. (Emphasis added.)

In the present case, there can be no dispute that the circuit court followed these guidelines prior to dismissing the case from its docket. Pursuant to guideline one, the circuit court, contemplating dismissal of Appellant's Counterclaim, sent a notice of its intent to do so to all counsel of record on January 17, 2006. The notice informed that unless the plaintiff filed and duly served a motion within fifteen days of the date of the notice, alleging good cause why the action should not be dismissed, then such action would be dismissed, and that such action also would be dismissed unless plaintiff requested such motion be heard or requested a determination without a hearing. Pursuant to guideline two, the notice further stated that any party opposing such motion shall serve upon the court and the opposing counsel a response to such motion within fifteen days of the service of such motion, or appear and resist such motion if it be sooner

set for hearing. Last, pursuant to guideline three, the notice advised the parties how the circuit court would dispose of the case. It informed the parties that if no motion was made opposing dismissal, or if a motion was made and was not set for hearing by either party, the court could decide the issue upon the existing record after expiration of the time for serving a motion and any reply. To that end, if the motion is made, the court was to decide the motion promptly after the hearing. Here, no motion was made opposing dismissal of the matter that would cause the circuit court to proceed beyond guideline three. Accordingly, the circuit court properly dismissed the case upon the existing record, which had remained idle for more than one year.

The circuit court further followed the guidelines set forth in Dimon when considering Appellant's motion to reinstate her Counterclaim. Guideline eight specifically states that should a plaintiff seek reinstatement under Rule 41(b), the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff had responded to the court's initial notice. Id. Presumably, then, once a motion to reinstate has been filed the circuit court is to proceed through the remaining guidelines as if a plaintiff responded in the first instance when the circuit court notified the parties of its intent to dismiss the matter. Here, Appellant, by her new counsel, Mr. Brewer, moved the circuit court to reinstate her claim on February 16, 2007. No request for hearing was made in Appellant's motion. Pursuant to guideline one, an action is to be dismissed unless plaintiff requests her motion be heard or requests a determination without a hearing. Id. Appellant's motion never requested a hearing. The Court decided Appellant's Motion to Reinstate upon the existing record and made written findings and issued a written order, pursuant to guidelines three and six.

Appellant argues that the trial court abused its discretion by failing to set the matter of determining good cause for hearing. Appellant's Motion to Reconsider Order Denying Motion

to Reinstate and Appellant's Brief represents that Appellant's new counsel Mr. Brewer contacted the court's office to check the status of the Motion to Reinstate and to inquire as to the setting of a hearing on the Motion to Reinstate. Mr. Brewer learned on May 29, 2007, as he was preparing a letter to send to the circuit court to check the status of the motion hearing, that the Court had already entered an Order denying the Motion to Reinstate. As stated in guideline one of Dimon, a plaintiff making a motion alleging good cause why an action should not be dismissed must note to the court whether he or she desires for such motion to be heard or request a determination without a hearing. Id. A motion that is filed without making such notation is to be dismissed. Id. As noted previously, Appellant's motion to reinstate did not request a hearing and it was not accompanied by a "Notice of Hearing" to place the circuit court on notice that Appellant wished to hold a hearing on the matter. The circuit court was not required to consider Appellant's Motion to Reinstate, but did so anyway in spite of the Motion's deficiency. Quite clearly, the circuit court did not abuse its discretion when it chose not to hold a hearing on Appellant's Motion to Reinstate.

Also, Appellant argues that the circuit court abused its discretion by failing to engage in the burden shifting requirement set forth in guideline four of Dimon. Appellant claims that she appropriately set forth evidence of good cause for failure to prosecute her claim, citing evidence of her difficulties with her attorney and a motor vehicle accident in which she was involved on October 29, 2004. Appellant claims this evidence shifted the burden to the opposing party to show substantial prejudice to it in allowing the case to proceed and required the circuit court to hold a hearing to conduct a factual inquiry. No other party to this matter came forward to present evidence opposing Appellant's Motion to Reinstate. Accordingly, the circuit court considered only the evidence Appellant set forth in her Motion to Reinstate when making its

determination as to whether good cause had been established by Appellant. Appellant had an obligation to set forth all evidence in her Motion which she believed the Court should take into consideration when making its decision as it was her opportunity to be heard. However, the only evidence Appellant presented to support her request for reinstatement was the statements that she "had difficulties with her counsel of record" and that "the attorney/client relationship terminated between this party and her counsel and ongoing activity in the matter ceased." She never mentioned in her motion her alleged motor vehicle accident. The circuit court, using its discretion, appropriately weighed the evidence presented by Appellant and found that she had not met her burden to show good cause and denied Appellant's motion to reinstate.

It was under these circumstances that the circuit court was met with Appellant's June 8, 2008, Motion To Reconsider Order Denying Motion to Reinstate. The circuit court correctly denied Appellant's motion, finding that all matters had been taken into consideration in previous Orders entered in the case and reconsideration was not necessary. After all, the circuit court had previously provided Appellant notice and an opportunity to be heard. Appellant's Motion provided no new evidence to demonstrate good cause and thus, no reason to reconsider Appellant's Motion to Reinstate.

VII. CONCLUSION

The circuit court properly denied Appellant's Motion To Reconsider Order Denying Motion to Reinstate. Appellant would like an opportunity to re-argue the substance of the law and evidence that existed at the time of the circuit court's initial decision denying reinstatement of her counterclaim and third-party complaint. However, Rule 60(b) does not serve Appellant's intended purpose. A motion pursuant to Rule 60(b) is not an opportunity to reargue facts and theories upon which a court has already ruled. Rule 60(b) does not present a forum for the consideration of evidence which was available, but not offered at the original proceeding.

Appellant's Motion To Reconsider Order Denying Motion to Reinstate was nothing more than a request that the court change its mind, which is not authorized by Rule 60(b).

Moreover, even if Rule 60(b) allowed such a motion, Appellant failed in every respect to show good cause for her delay in prosecuting her claims. Appellant had a continuing duty to monitor her case from the filing until the final judgment. More specifically, it was Appellant's obligation to move her case to trial. Appellant failed to perform her duties and as a result lost her right to pursue her claims. Pursuant to Rule 41(b) and the guidelines set forth in Dimon, the circuit court provided Appellant notice and a right to be heard prior to dismissing her claim and when considering her Motion to Reinstate

Accordingly, Builders' Service and Supply Company respectfully requests this Honorable Court affirm the decisions of the Circuit Court of Taylor County, West Virginia and deny Appellant's request for reinstatement of her claims.

Dated this 29th day of August, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2008, I caused to be served the foregoing "Brief of Appellee" upon the following counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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